No. 2980

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of
H. S. WHITE, doing business under the name of H. S. White Machinery Company,

Bankrupt.

WILLIAM R. PENTZ, as Trustee in Bankruptcy of the Estate of H. S. White, doing business under the name of H. S. White Machinery Company,

Appellant,

vs.

H. S. WHITE, doing business under the name of H. S. White Machinery Company, Bankrupt,

Appellee.

BRIEF FOR APPELLANT.

CLARENCE A. SHUEY,
WINFIELD DORN,
Attorneys for Appellant.

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By.....Deputy Clerk.

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Statement.

Appellant filed a petition in the District Court stating that the bankrupt had applied for a dis-

charge and that many of the largest as well as the smallest creditors desired him as Trustee to oppose the same, and prayed for an order authorizing him so to do (Tr. 8, 9).

The referee sent out notices to all of the creditors that the Trustee had filed a petition for an order authorizing him to oppose the discharge and that the petition would be heard at a certain time and place, and thereafter a meeting was held at the time and place specified in said notice (Tr. 20). At this meeting the application of the Trustee was heard and considered by a majority in amount and number of all creditors whose claims had been allowed and they announced and declared in favor of authorizing the Trustee to oppose the discharge (Tr. 72 and 84). Thereupon the referee asked if there was any creditor present who objected, and no objection being made, and all creditors assenting thereto, the referee made an order, from which no appeal was ever taken, expressly authorizing the Trustee to oppose the discharge (Tr. 10 and 20). Thereafter the Trustee filed an appearance in the District Court in opposition, stating that he had been first duly authorized by the court so to do (Tr. 11). Thereafter, within the time required, the Trustee filed specifications of objection to the application for discharge, to which the bankrupt filed an answer, the substance of which was a denial of the grounds of opposition (Tr. 19) and not denying authority of the Trustee or sufficiency of the specifications (Tr. 16).

The issues raised by the pleadings were referred to A. B. Kreft, Referee, as special master, to ascertain the facts and report his conclusions thereon, and the same came on regularly to be heard (Tr. 18). Counsel for the bankrupt then for the first time urged certain objections to the introduction of testimony (Tr. 100). After lengthy arguments and briefs filed, the question whether the objections were well taken was submitted to the special master and after careful consideration the objections were overruled and the Trustee instructed to proceed with his evidence (Tr. 19), and testimony covering three hundred and ninety-four pages was introduced and the matter being submitted, and authorities presented, the master made a lengthy report to the District Court in which he commented on the intelligence and shrewdness of the bankrupt, and declared that the bankrupt's testimony was not to be credited and that his statements were destitute of those elements which commanded confidence and justified judgment, and that it was the master's conclusion that the bankrupt had, *with the intent* to conceal his financial condition, failed to keep books of account or records from which such condition might be ascertained, and had given a false statement to the Bank of California at the time of obtaining a loan therefrom, and the master thereupon found that the charges against the bankrupt had each and all been proven and recommended as his con-

clusion that the bankrupt's discharge be denied (Tr. 18 at 59, 61, 62).

No exceptions were taken by the bankrupt to this report and all matters, both in law and fact, having been decided in favor of the Trustee, appellant herein, there was no occasion for him to take exception, and therefore he asked that the District Court confirm the same. Thereafter the District Court, disregarding the findings and recommendations of the referee, and reversing certain rulings of the referee as set forth in the master's report, and without giving the Trustee any opportunity to offer testimony or ask leave to correct the record to conform to the contrary ruling on the objections, made an order granting the application of the bankrupt for a discharge upon the ground that the facts as set forth in the referee's report did not show that the Trustee had been duly authorized to oppose the discharge (Tr. 63-65).

Thereupon the Trustee immediately filed a motion with affidavits to vacate the order granting the discharge, and for an order re-referring the matter to the master in order that the Trustee might not be prejudiced by the contrary ruling of the court and might have the same opportunity to ask leave to amend and offer new testimony that he would have had in the first instance, and that the master might certify and find as to the actual facts relating to the Trustee's authority, which had

been omitted (Tr. 68), and if inserted would show that at a meeting of creditors duly called the matter of the Trustee's application for authority to oppose the discharge was held and considered by a majority in number and amount of the creditors of the estate whose claims had been allowed, and that all of said creditors present or represented had announced and declared in favor of authorizing the Trustee to oppose the discharge, and the referee thereupon, after asking if any creditors objected, and receiving no reply, made an order authorizing the Trustee to oppose the discharge (Tr. 69-73).

At the time of filing said motion to vacate, the Trustee, as a further protection to the Trustee and creditors' rights, filed a petition for rehearing, with affidavits setting forth these facts, and asking for a rehearing of the matter in order to introduce the testimony in support of the Trustee's actual authority above indicated (Tr. 74-82).

Thereafter the District Court made an order denying both the motion and the petition for rehearing (Tr. 93) and granted the discharge from which this appeal is taken.

The question presented for this court to determine is whether the judgment of the District Court disregarding the findings and recommendations of the master and reversing certain of his rulings, and denying the motion to vacate and for rehearing, and granting the bankrupt a discharge, was

erroneous and against the just rights of the Trustee.

Assignments of Error.

All of the assignments of error are relied upon and may be considered under two main divisions.

First. Assuming that the District Court was correct in deciding that the record was insufficient to permit it to follow the master's findings and recommendations, it erred in forthwith granting the discharge to the bankrupt without giving the Trustee the right and opportunity to correct the record to conform to the facts (Assignments 17-21 inclusive).

Second. That on the record before the District Court it erred in granting the discharge (Assignments 1-16 inclusive).

Argument and Authorities.

First.

ASSUMING THAT THE DISTRICT COURT WAS CORRECT IN DECIDING THAT THE RECORD WAS INSUFFICIENT TO PERMIT IT TO FOLLOW THE MASTER'S FINDINGS AND RECOMMENDATIONS, IT ERRED IN FORTHWITH GRANTING THE DISCHARGE TO THE BANKRUPT WITHOUT GIVING THE TRUSTEE THE RIGHT AND OPPORTUNITY TO CORRECT THE RECORD TO CONFORM TO THE FACTS.

While it is the policy of the law, as laid down by Congress in the Bankruptcy Act, to give to the

honest but unfortunate debtor relief from his creditors by a discharge, and therefore only a few specific grounds of objection to cover dishonest cases have been enumerated under the Bankruptcy Act, yet it is also clearly the policy of the law in cases where the bankrupt has been guilty of intentional dishonesty and brought himself within these grounds of opposition, to deny him any relief in the form of a discharge. The cases upholding this policy are so numerous and well known to this court that we will only refer to *In re Glass,* 119 Fed. 509, hereinafter quoted. In the instant case the report of the master to the District Court (Tr. 18-62) shows conclusively that the bankrupt herein was of the latter class, he having with intent failed to keep books and made a false statement in order to defraud his creditors. Therefore it is the duty of this court to grant such aid to the creditors as is legally within its powers in order to carry out the policy of the law and prevent a dishonest debtor from escaping liability to his creditors.

From the opinions of the District Court (Tr. 63, 91) it might appear that the Trustee was not taken by surprise and was guilty of laches or negligence in presenting his case. Therefore we wish first to call this court's attention to the course pursued by the Trustee, and the prejudice to him, through no intentional fault of his own, resulting from the decision of the District Court. The first time any question was made as to the authority of

the Trustee to oppose the discharge was on the day of the hearing before the master, although months had elapsed in which the bankrupt might have amended his answer or in other ways raised the point if he had seen fit. When the objections were raised, the master sitting as an arm of the District Court, decided in favor of the Trustee on all objections made. No appeal was taken by the bankrupt and there was no reason for the Trustee's doing so when the decision of the master had been entirely in his favor. Therefore, there was no negligence or laches so far on the part of the Trustee. The Trustee most diligently offered a large amount of testimony and the master decided again in his favor on the merits. Therefore, there was still no cause for him to take other steps than those taken. The report of the master came on for confirmation before the District Court, and the same being in favor of the Trustee, there was no occasion for him to take any step other than that taken, namely, to ask for confirmation. At any time prior to confirmation any act upon the part of the Trustee to proceed other than as he did would have been to act contrary to the decision of the master and been merely consuming the time of the court and running up expense to the estate unnecessarily. Therefore, the first time the Trustee was called upon or permitted to proceed, other than in accordance with the master's ruling, was when the District Judge reversed the rulings of the master as to the authority of the

Trustee necessary to oppose the discharge. Thereupon immediately the Trustee, with great diligence, filed a motion to vacate, with affidavits, and a petition for rehearing, with affidavits. Upon this record can there be any criticism of laches or neglect upon the part of the Trustee?

Now suppose the master had, instead of deciding in favor of the Trustee, decided against him, what course would he have pursued? Immediately he would have proceeded to cure defects in the pleadings, if there were any, by asking leave to amend, which would have been granted undoubtedly, as it is the spirit of the bankruptcy law to try and see that justice and not technicalities prevail in a case of this character. He would without difficulty have offered evidence showing conclusively that the Trustee had been authorized by the creditors, and the matter would have been finally determined on the merits.

Furthermore, suppose the District Court had seen fit to hear the whole matter without the assistance of a master, what would have been the result? When the objections were urged by the bankrupt the court would presumably have sustained them. The Trustee would then immediately have had the opportunity to take the same steps as he would have taken before the master upon a similar ruling in order to protect the interests of the creditors whom he represents. Now in the instant case the Trustee had not such opportunity at any time until the District Judge made the order reversing the

master and granting the discharge. Immediately upon this order being made the Trustee took as nearly as possible the same course by motion and petition to obtain relief that he would have taken if there had been any previous occasion or reason therefor. The District Court upon his so doing in some way came to the conclusion erroneously that there had been laches upon the part of the Trustee and denied the motion of the Trustee. Therefore it clearly appears that the Trustee's rights have been greatly prejudiced by the conflicting rulings of the District Court and its master, due to the fact that the District Court granted a discharge instead of merely reversing the ruling of the referee and placing the matter back where it was at the time the objections were overruled by the master and permitting the Trustee to take such steps as he might have taken at said time without prejudice.

Furthermore, the opinion of the District Court (Tr. 92) states that the Trustee was not taken by surprise, for the bankrupt urged from the beginning the lack of authorization of the Trustee. While that may be true if the language of the objection is read with one interpretation, it is not true if read as interpreted by the master and attorneys for the Trustee at all times up to the decision by the District Court reversing the referee. The bankrupt on the hearing before the master of objections to introduction of testimony, when told that actual authority had been given by

the creditors at a meeting of creditors took the position (Tr. 73) that that made no difference because the notice sent out by the referee to the creditors calling the meeting was defective and no legal meeting was held, and therefore the whole proceeding being a nullity, no authority had been given the Trustee by the creditors. There is nothing in the record before the referee showing that the bankrupt ever made any other contention, and the District Court's interpretation otherwise of the objection was the first time either of counsel for the Trustee ever heard of such contention being urged by the bankrupt (Tr. 70, 73). The master's report also confirms this and shows clearly that the point taken by the bankrupt was "that the notice sent out by the referee of the hearing upon the Trustee's application" was defective and therefore no meeting being duly held, the Trustee had not authority (Tr. 20).

From the above it is clearly apparent that a dishonest debtor has been discharged from his debts and the creditors represented by the Trustee have been greatly prejudiced by the order of the District Court, through no fault on their part or that of the Trustee.

The policy of the law, as before stated, in reference to a discharge in bankruptcy, is to have the same determined upon the merits. The report of the master shows clearly that the bankrupt in this case was intentionally guilty of fraud and should not have been granted a discharge on the merits.

In the case of *In re Glass,* 119 Fed. 509, frequently referred to since said time, the court said:

> "It is admitted by counsel that the specifications are not in proper form and leave is asked to amend them. Objection is made that there is nothing by which to amend, the specifications being so entirely defective. There was an old doctrine that amendments could be made only where a good cause of action was defectively stated, but in modern practice, and especially under our liberal federal statutes of amendments, an entirely new cause of action may be stated in a pleading by way of amendment and there are some very radical and startling rules to that effect. Some decisions are against this, particularly where the bar of the statute of limitations is involved or some like effect is the result of allowing the substitution of the new ground of action. Still the modern rule is that of great liberality in quite all cases and it seems to me that if a bankrupt has been guilty of any of the offenses for which his discharge may be opposed the most liberal rule of amendment of specifications should prevail and that he should not be allowed to escape by the failure of the creditors to properly plead the grounds of opposition. The ordinary discretion of the court will protect the bankrupt against any injustice in the application of this liberality of amendment; his privilege of discharge from his debts is purely a matter of statutory grace and not of any common right at all and he should expect always to be denied discharge unless he complies strictly with the conditions entitling him to that indulgence by refraining from any wrongdoing denounced by the statute as a bar to his discharge. Here the specifications indicate that if the facts be properly pleaded there may be a bar, not certainly so, and it may in the end turn out to be only a fraud

upon creditors not made a ground for opposing the discharge, but it may be otherwise, and the averments are not so entirely destitute of all merit as to invoke even the old rule of amendment relied on by the bankrupt's counsel."

The court then cites a large number of cases and says:

"The practice as to amendments under the existing bankruptcy statute of 1898 is just as liberal as under the former act and in other courts. * * * The bankruptcy statute being very liberal to the debtor in the matter of his discharge, confining the grounds of opposition to conduct on his part of a criminal nature of *quasi*-criminal carelessness and negligence, he should not be allowed to receive the acquittance of the statute because of any embarrassment or obstruction encountered by his creditors in presenting their opposition to his application for it. Only negligence of a culpable character on their part should debar them from the benefit of Revised Statutes, Section 954, as to the amendment of their specifications, and these, it seems to me, are the considerations which should control the court in the exercise of its discretion in the premises."

Furthermore, the master was an arm of the District Court, sitting in its aid.

In the case of *Rauchenplat,* 9 A. B. R. 763, the court said:

"The opinion and order granting a discharge was entered herein on June 12, 1902. Motion for rehearing was made on June 18, 1902. The ground of it is that the referee exceeded his jurisdiction in reporting to the

court that the objections of the creditors to the discharge are not sustained by the evidence taken by him. The order of reference directs him to report the facts, with the evidence taken, to the court, together with his findings as to the same.

"The application for discharge must, by section 14 of the Bankrupt Law, and General Order in Bankruptcy, No. 12, Section 3, be heard and decided by the judge of the court. The referee has no jurisdiction to determine the question, but the court may refer the case to him generally for a report. He aids the court like a master of chancery. He cannot finally determine the question of discharge or nondischarge, but he may be ordered to report the facts and his recommendation or conclusion as to the matter. This is merely to aid the judge, and the court then determine the matter. The practice in bankruptcy is much like that in equity, and it is hardly supposable that the law-making power intended that a court, if it saw proper, should not avail itself of such aid. (In re Kaiser, 2 Am. B. R. 767, 99 Fed. 689)."

The errors of the master were therefore the errors of the court and should be corrected if possible without injury to the Trustee.

"Where the defect does not consist in a total failure to state some element of the act admitted to be alleged, but consists only in stating it with not sufficient definiteness, it would seem to be the better rule that such defect should be urged before the hearing and that it is waived by going to hearing thereon without objection."

Rem. on Bankruptcy, Vol. 2, Sec. 2610.

Therefore, if this whole matter had been heard before the District Court in the first instance, the question as to the authority of the Trustee and the sufficiency of the pleadings would have been passed upon and defects, if any, as to the record would have been corrected and the case would have proceeded to final determination upon the merits and a discharge would have been denied the bankrupt herein.

SECOND.

THAT ON THE RECORD BEFORE THE DISTRICT COURT IT ERRED IN GRANTING THE DISCHARGE.

It may be contended that the question whether the District Court erred in denying the motion to vacate the order granting a discharge and denying the petition for rehearing cannot be raised upon this hearing, but such contention cannot be sustained. The very fact that in one decided case it is implied that no appeal can be taken from an order denying a petition for rehearing or a motion to vacate the order granting a discharge shows that the denial of such a petition or motion can only be considered on an appeal from the judgment which does not become final until the petition or motion is denied. The time within which to appeal does not begin to run from the order first made granting the discharge, but from the order denying the motion or petition for rehearing.

In *Mills v. Fisher,* 159 Fed. 897, C. C. A., Sixth Circuit, where a petition for rehearing was filed after the court had made an order appealable under Section 25 of the Bankruptcy Act as in this case, the appellate court said:

> "The objection that the appeal was too late is not well founded. Before the ten days allowed for an appeal had expired a petition to rehear was filed. Within ten days after this was disposed of and the judgment thereby made final this appeal was prayed and allowed. This was in time." (Citing cases.)

Therefore the petition for rehearing and motion with affidavits were before the District Court at the time that judgment became final and are before this court for consideration in determining whether there was error in said final judgment. If such was not intended to be the practice undoubtedly Congress would have granted some relief by appeal from the order denying the petition for rehearing or from the order denying the motion to vacate the order granting the discharge.

Under the law of this State on an appeal from a judgment the court may review any order made on motion for new trial.

See Sec. 956, Code of Civil Procedure of California.

> "Upon an appeal from a judgment the court may review the verdict or decision, and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment, or which substantially

> affects the rights of a party. The court may also on such appeal review any order on motion for a new trial. The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken."

Therefore the record as forwarded to the District Court and the petition for rehearing and motion to vacate with affidavits are properly before this court for consideration in determining whether the District Court erred in entering its final judgment granting the discharge.

But apart from the error of the District Court in denying the timely application of the Trustee for relief against technicality, we respectfully submit that even on the record as made by the master to the District Court, a discharge should have been denied. We say this for the reason that the findings of facts of a referee are conclusive unless manifest error is shown and no attempt to do this was made here. (*In re Noyes,* 144 Fed. 506 (C. C. A., Mass.).)

We believe that the District Court erred in its construction of the record certified to by the master to the District Court, which shows among other facts:

1. The petition for a discharge (Tr. 4);
2. The petition for authority to oppose the application of bankrupt for discharge (Tr. 8);
3. Notice of application sent to creditors calling meeting for hearing on application (Tr. 20);

4. Order granting Trustee authority to oppose the discharge (Tr. 10);
5. Appearance of Trustee on opposition (Tr. 11);
6. Specifications of objection of Trustee (Tr. 12);
7. Answer of the bankrupt to specifications (Tr. 16);
8. Master's report stating the objections to authority given Trustee (Tr. 19).

From an examination of this record it appears that a meeting of creditors was held for the purpose among others of authorizing the Trustee to oppose the discharge and that at this meeting an order was made by the referee authorizing the Trustee so to do and no creditor objected thereto (Tr. 20). While it may be true that it would be better practice for some of the pleadings to have more fully set forth the facts and for this order to have contained a more specific finding of fact, namely,—that it was made at the request of a majority in number and amount of creditors whose claims had been allowed and were present at a meeting called for the particular purpose, yet all of these pleadings certainly contained sufficient facts to warrant a court's granting leave to amend if promptly asked and the order has nothing in it showing that it was not properly made and the burden is on those attacking it to show that it was

not properly made as all intendments are in favor of the validity of judgments of courts.

Creditors meetings are commonly under the law held before the referees before whom most of the administration of estate is had and they report to the court. Otherwise no record of the same would exist. When the creditors at these meetings act it is clearly intended that the referee shall as chairman of the meetings obtain the will of the majority and record their decision, which was done in this case by the order. Therefore as such officer his recordation of the ultimate fact, namely, whether the majority did or did not authorize the Trustee, should be final unless directly attacked. If so attacked the one so doing should at least have the burden of establishing facts showing that the will of the meeting was other than recorded. In this case the order of the referee as chairman not showing anything on its face to the contrary, imports that it was made at the instance of the creditors in the manner required by law, and, nothing whatever appearing in the record herein to show the contrary, the District Court erred in holding that the Trustee's offering of the order to oppose the discharge was not at least *prima facie* proof of his actual authority.

Furthermore, from the Congressional Record in reference to this amendment, the purpose was to protect the creditors and not the bankrupt. See report No. 691, Senate Judiciary Committee, reading as follows:

> "The first of these changes, making the Trustee a competent party to oppose a bankrupt's discharge, is a desirable change, as thereby the expense of the proceedings in opposition to discharge will be spread over all of the creditors and not borne by a single creditor who may vouch objections. Moreover it lessens the danger of improper oppositions to discharge by single creditors for the purpose of enforcing settlements. The second change, namely, that the Trustee can only oppose discharge when authorized to do so at a meeting of creditors, is also desirable, affording a proper check upon improvident and improper opposition to discharge."

No provision is made requiring the referee to give notice to the bankrupt of the Trustee's application for authority to oppose the discharge, and if he had appeared at the meeting and opposed thereat the will of the majority it would have availed him nothing. Therefore why should he have the right in this proceeding to question the authority given the Trustee by the order of court made at the meeting of creditors and importing on its face that it was a record of the will of the majority properly given? The specifications were not defective in substance because they were made by a Trustee who under the act is a proper party, if not at all times, at least after authority has been given him by the creditors.

> "The Trustee, however, is not a party to the proceedings for discharge until he has been made so by the directors at a meeting called for that purpose. *When the authority is ob-*

tained he becomes a party to the proceeding by filing his specifications of objections."
In re Hockman, 205 Fed. 332.

In the present case proper authority in fact had been given and the records show that the appearance and specifications of the Trustee had been filed, reciting the Trustee's authority from order of the court, and answer thereto only denying the grounds of opposition; *also the order of court made as evidence of the conclusion of the creditors in giving this authority to the Trustee.*

While a bankrupt is not obliged to file an answer or other plea in resistance to the specifications of objections (*In re Logan,* 102 Fed. 876), yet where he elects so to do and by his filing an answer leads the Trustee and the referee to believe that the only issues were as raised by the pleadings, he should be bound thereby. If he is not to be so bound, the same liberality should be extended the Trustee by the court in order that there shall be no prejudice and that the Trustee shall be able to correct any omissions resulting from such action on the part of the bankrupt.

Under specific rules of some of the district courts it is the settled practice to require the sufficiency of specifications of objections to the discharge of a bankrupt to be raised before the judge on motion within a specified time. This is so in the State of New York (*In re Baldwin,* 119 Fed. 796). In other districts, such as here and Massachusetts, there are

few specific rules with reference to procedure in bankruptcy, the courts taking it upon themselves to informally see that justice prevails.

> "Counsel for the joint creditors raised certain formal objections based upon the state of the record. It is sufficient to say that this court has not hitherto required and does not intend to require hereafter any particular formalities to be observed in seeking a review by the Judge of the orders or other proceedings of a referee. If the matter in dispute is substantially set out that is enough. * * * If this practice shall seem lax to some, the answer is that it has hitherto been found sufficient in this district, both for the Judge and for the parties, and it has not been abused. A stricter practice has been adopted in some other districts, doubtless because it has been deemed convenient there."
>
> *In re Swift,* 118 Fed. 349.

It makes very little difference which course is pursued so long as consistently followed. If a specific rule had been provided, in the instant case we would not be before this court, because the questions now raised would have been determined or waived before the hearing was concluded before the referree. Since there is no rule in this district and the District Court has seen fit to be liberal with reference to the bankrupt by permitting him to make objection to the specification months after the same had been filed by the Trustee and answer thereto filed by the bankrupt, the District Court should extend the same liberality to the Trustee in order

to permit the Trustee to protect the rights of the creditors of the estate. If the bankrupt had desired to ascertain more fully the facts surrounding the authority given the Trustee, he might have filed a special demurrer and asked that the specifications be amended so that they would set forth the facts and circumstances surrounding the making of the order authorizing the Trustee to oppose a discharge, but he did not so do.

The wording of the Bankruptcy Act in question is:

> "Provided that a Trustee shall not interpose objections to a bankrupt's discharge *until has been authorized so to do at a meeting of creditors* called for that purpose."

So far as known to counsel, the Supreme Court has not interpreted this proviso. Certain of the District Courts have done so in certain respects but in no respect which militates against the substantial position of the Trustee herein.

In all of such cases the record affirmatively showed that the Trustee had not been authorized by the creditors. In the instant case we believe that the record by fair intendment shows that the Trustee was in fact actually authorized by the creditors, but if it does not so show we ask with what we believe to be all possible diligence the right to such relief as will enable us to make the record show such fact.

In the case of *Churchill,* D. C. Wis. 197 Fed. 114, where, at a meeting, creditors had authorized a Trustee to oppose a discharge, the referee made an order granting authority but only upon certain conditions. The Trustee and creditors being dissatisfied with the conditions, reviewed the order and the court stated that regardless of whether or not a Trustee was a party in interest and capable of opposing the discharge before 1910, that now there was no question of such capacity, provided only that the creditors at a meeting called for that purpose authorize him so to do, and said:

> "The act gives to creditors the privilege of determining whether such right to exercise and the extent of such authority is based upon the statute. The action of the creditors is merely a prerequisite."

It will be noted in that case that an order was made which evidenced the will of the meeting incorrectly on its face. No criticism was made of the procedure taken, but of the fact that the referee erroneously tried to act contrary to the will of the meeting and on review was reversed.

In the instant case there is nothing in the record which was before the District Court showing that the creditors did not give such authority as indicated in the order from which no review was taken by the bankrupt. On the other hand, there was before the District Court the fact that a meeting had been duly called and held for such purpose; that no creditors objected to the Trustee's being

authorized to oppose the discharge; that the referee had made an order at the meeting so authorizing the Trustee, after asking if there was any objecting creditor, presumptively in order to determine whether the will of the meeting which he was recording was unanimous. The affidavits of both of counsel for the Trustee were to the effect that a majority in number and amount of creditors of the estate whose claims had been allowed and were present had announced and declared in favor of authorizing the Trustee to oppose the discharge. There was no denial of these facts. It is true the bankrupt's attorney also made affidavit on opposition to the petition for rehearing and the District Court in its opinion (Tr. 91) said:

> "I see no reason in view of the conflicting affidavits now presented for disturbing the conclusions heretofore reached."

But as will appear from the affidavits on this point, there was no conflict. The bankrupt's attorney was not present at the creditors' meeting and had no knowledge of what took place at the meeting and in his affidavit merely stated that he believes no actual authority had been given because the record did not show it. He offered no evidence in denial of affidavits of counsel for the Trustee. If he had done so the testimony of the referee and several creditors present at the meeting could promtly have been obtained to substantiate our affidavits.

While the record before the District Court was not in such perfect form as it might have been, in the light of the ruling of that court, yet we do believe it was amply sufficient under the liberal practice which has prevailed in bankruptcy matters, and in which practice we believe that it has been the disposition of the court to discourage technicalities and render decisions upon the merits.

The District Court in its opinion has stated that we were not taken by surprise. By our interpretation, which was further borne out by the referee in his report, and which we believe was fair, the objection was that no proper notice of the meeting had been given and therefore no authority could legally be given by the creditors thereat. While there may have been a conflict in the affidavits on the motion to vacate as to the reasonableness of our interpretation of the objection raised to the Trustee's authority, there was none as to the proposition that actual authority had in fact been given by the creditors at the meeting which the District Court held had been legally noticed. This is most significant evidence that there was such actual authority, but our plea to this court is not with the idea of relieving ourselves of responsibility if there be a technical defect in the record but in the honest belief that it is proper for this court upon the record before it to avoid what must otherwise manifestly appear to be a miscarriage of justice.

Therefore we ask reversal of the judgment of the District Court, with such other relief as to this court may seem proper.

Dated, San Francisco,
September 29, 1917.

Respectfully submitted,

CLARENCE A. SHUEY,
WINFIELD DORN,
Attorneys for Appellant.